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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Service	)	WT Docket No. 96-162
	)	
Implementation of Section 601(d) of the Telecommunications Act of 1996	)	

PETITION FOR RECONSIDERATION

Pursuant to Section 1.429 of the Commission's rules, the Independent Telephone and Telecommunications Alliance ("ITTA") submits this petition for reconsideration of the Commission's *Report and Order*, FCC 97-352 (rel. Oct. 3, 1997), in the above captioned proceeding ("*Report and Order*").[1]

I. INTRODUCTION

ITTA is a coalition of 14 independent, mid-sized telephone companies formed to represent the interests of mid-sized telephone companies -- defined in the Telecommunications Act of 1996 (the "1996 Act") as those companies that serve less than two percent of the nation's access lines ("mid-sized LECs" or "Two Percent Companies").[2] ITTA's Members currently operate in 41 states and serve over seven million customers, which in total, is less than one-half

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1 GTE Midwest Incorporated ("GTE") (on December 12, 1997) and BellSouth Corporation (on December 23, 1997) have filed petitions for review of the *Report and Order* in the Court of Appeals for the Eighth Circuit and the District of Columbia Circuit, respectively. On December 18, 1997, GTE filed a motion to transfer the case to the United States Court of Appeals for the Sixth Circuit. *GTE's Motion to Transfer*, GTE v. FCC, Case No. 97-4251 (6th Cir. December 18, 1997).

2 47 U.S.C. § 251(f)(2).

the number of customers served by the smallest Bell operating company (US West serves approximately 15 million customers).[3]

Although ITTA commends the Commission for recognizing that the Two Percent Companies may not require as stringent regulation as their larger brethren, the Commission has adopted a separate affiliate rule for LECs offering commercial mobile radio services ("CMRS") based on a lack of record evidence that any CMRS providers have been unable to compete effectively against the Two Percent Companies in the provision of CMRS services. Not only does this restriction on Two Percent Companies reverse long-standing Commission policy, it contradicts both the deregulatory policies that Congress sought to further by adopting the 1996 Act and the thrust underlying the Commission's biennial review of Commission regulations required by the 1996 Act.[4] Wholly unjustified, this rule will burden Two Percent Companies with new restrictions without any producing any appreciable gains in CMRS competition.

By implementing this new rule, the Commission has only taken a half-step toward implementing the pro-competitive and deregulatory policies of the 1996 Act. Although the Commission has now recognized the distinction between larger LECs and mid-sized LECs by granting mid-sized LECs the ability to obtain a waiver of the Commission's separate affiliate rule, this action is well short of implementing fully Congress' intent behind Section 251 of the 1996 Act. In Section 251, Congress sought to lessen the burdens on all but the largest LECs when it adopted its pro-competitive telecommunications market structure.[5] Accordingly, the

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3 *See FCC Statistics of Common Carriers*, Part 1, Table 1.1 (released December 5, 1997).

4 47 U.S.C. § 161.

5 *Report and Order* at ¶ 70.

Commission is obligated to adopt *meaningful* distinctions in its regulations between large and mid-sized LECs when, such as in this situation, different market positions of the LECs warrant such differences.

Adopting regulations that vary with the size of the company regulated complies fully with the Court's holding in *Cincinnati Bell*.[6] In that case, the Court determined that the Commission should, on remand, justify why it regulated Bell Company offering of cellular services differently than their offering of PCS because the two services are sufficiently similar to warrant similar regulatory treatment.[7] The Court remanded the case so that the Commission would regulate similar services (PCS and cellular) similarly. The Court expressly did not require the Commission to regulate *dissimilar* LECs similarly when they offer similar services. In fact, it has been a cornerstone of the Commission's regulatory policies for decades to treat different-sized LECs differently.[8]

The Commission has unwisely not made these same regulatory distinctions in this proceeding, but rather imposed burdensome and unnecessary new restrictions on the ability of Two Percent Companies to provide in-region CMRS services. Accordingly, the Commission should eliminate its new rule requiring that Two Percent Companies offer CMRS services through a separate affiliate.

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6 *Cincinnati Bell Telephone Co. v. FCC*, 69 F.3d 752 (6th Cir. 1995).

7 *Cincinnati Bell,* 69 F.3d at 767.

8 *See e.g., Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd 6786 (1990) (the Commission adopted mandatory price cap regulation only for the largest LECs).

II. THE COMMISSION HAS FAILED TO JUSTIFY THE IMPOSITION OF A SEPARATE AFFILIATE REQUIREMENTS ON TWO PERCENT COMPANIES.

Despite the Commission's acknowledgment that "for certain incumbent LECs, the costs imposed by separation may outweigh [the Commission's] interest in promoting competition and preventing anticompetitive conduct,"[9] the Commission refused to make any distinction in the regulation of mid-sized and large LECs with respect to the provision of in-region CMRS service other than granting mid-sized LECs the option of petitioning for a waiver of the separate affiliate rule.[10] The Commission, while recognizing the problem with its new regulations, has failed to provide an adequate remedy that justifies the same treatment of mid-sized LECs and large LECs. Under the rules adopted in the *Report and Order*, both mid-sized and large LECs are permitted to provide in-region CMRS service only through separate affiliates, which (1) must maintain separate books of account, (2) cannot jointly own transmission or switching facilities with their LEC affiliates if those facilities are used to provide in-region local exchange service, and (3) can obtain services from LEC affiliates only on an arms-length basis, subject to the Commission's joint cost and affiliate transaction rules.[11] Although these rules may make sense for companies that have multi-state regions with ubiquitous networks, they make no sense for mid-sized LECs that do not serve regions, but rather serve discrete areas within regions served by the largest LECs and are much smaller than the footprint of most CMRS providers.[12]

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9 *Report and Order* at ¶ 69.

10 *Id.* at ¶ 71.

11 *Id.* at ¶ 38.

12 Indeed, the Commission indirectly admits this by defining "in-region" CMRS to be a CMRS offering where 10 percent or more of the population covered by CMRS service area is within the incumbent LEC's wireline service area. *Id.* at ¶ 43.

As a result, these new rules are wholly unjustified with respect to mid-sized telephone companies where the effect of anticompetitive interconnection conduct is negligible and the costs of compliance not easily absorbed.

A. INCREASED COMPETITION DOES NOT JUSTIFY GREATER REGULATION OF MID-SIZED LECS.

In adopting its separate affiliate rule for mid-sized LECs, the Commission acknowledged that it was reversing its long-standing policy towards mid-sized telephone companies and would, for the first time, require them to create a separate affiliate to provide in-region CMRS.[13] To support this radical departure from its traditional policy, the Commission advanced the novel proposition that greater *regulation* of mid-sized LECs is appropriate because of increased *competition* in the telecommunications market.[14] This argument stands the pro-competitive policies of the 1996 Act on its head. One of the central purposes of the 1996 Act is to replace a regime based on government regulation with one based on competition.[15] The Commission's attempt here to use the existence of competition to justify greater regulation of mid-sized LECs undercuts the deregulatory policies of the 1996 Act.

Contrary to the Commission's assertions in the *Report and Order*, the increased competition that exists today in the telecommunications market does not justify greater, regulation. Mid-sized LECs face more competition than ever before -- from both larger LECs that surround or adjoin their service territories and from competitive LECs. For example, Southern New England Telephone ("SNET"), ITTA's largest member, competes with AT&T,

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13 *Id.* at ¶ 51.

14 *Id.* at ¶¶ 53-54.

15 *See* H. Conf. Rep. 458, 104th Cong., 2d Sess. 1, 113 (1996).

MCI, and over 20 other carriers to provide local service in Connecticut. Of these, five already have installed their own switches and several other have plans to do so in the near future. This type of vigorous competition is precisely what Congress envisioned when it enacted the 1996 Act, and it is precisely the type of competition that Congress intended as a replacement to Commission regulation. The Commission should not contravene this congressional policy by using the existence of competition to justify greater regulation of mid-sized LECs.

B. THE COMMISSION'S REGULATION OF MID-SIZED LECS' OFFERING OF CMRS SERVICES VIOLATES LONG-STANDING COMMISSION POLICY AND CONGRESSIONAL INTENT.

Since 1982, the Commission's policy has been to require only the larger LECs to create a separate affiliate to provide CMRS services.[16] For example, in the *Cellular Reconsideration Order*, the Commission expressly found that the benefits arising out of a structural separate subsidiary requirement did not justify the burden such a requirement would impose on mid-sized LECs, "including the cost of additional personnel and the possible dis-economies resulting from separate transmission facilities."[17] While the Commission expressed concern over possible anticompetitive practices, including interconnection abuses, the Commission at that time decided to rely on complaint procedures and non-structural safeguards to protect against those practices.[18] The Commission was correct; nothing in the record indicates that in the 15 years since the Commission released the *Cellular Reconsideration Order*, non-

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16 An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems, *Memorandum Opinion and Order on Reconsideration*, 89 FCC 2d 58, 78 (1982) ("*Cellular Reconsideration Order*").

17 *Id.* at 78.

18 *Id.*

structural safeguards have proven inadequate to ensure competition in CMRS services in areas served by mid-sized LECs.

In light of this long-standing Commission policy of reducing the burdens on mid-sized telephone companies, the Commission cannot now find support for its separate affiliate rule by invoking meaningless phrases like "regulatory symmetry."[19] Difference in regulatory treatment is proper because of the difference in market power enjoyed by larger and mid-sized LECs. Indeed, the Court in *Cincinnati Bell* required the Commission to provide "at least some support for its predictive conclusions," namely, that mid-sized LECs would use their so-called bottleneck control to disadvantage its CMRS competitors.[20] The Commission, however, has provided no such support for its conclusions here. In fact, the Commission has traditionally considered compliance with certain non-structural safeguards sufficient to protect against anticompetitive conduct, while imposing structural safeguards on larger LECs.[21] Consequently, the Commission arbitrarily and capriciously failed to justify a reversal of that position.

Moreover, the Commission's regulation of mid-sized telephone companies flies in the face of the Commission's acknowledgment that Congress sought to create a framework that would allow for more flexible regulation of smaller LECs. In enacting the 1996 Act, Congress rejected the idea of a "one size fits all" regulatory framework recognizing that mid-sized companies do not have the financial and technological resources possessed by the large carriers against whom they must compete.[22]. Instead, Congress recognized that small and mid-sized

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19 *See id.* at ¶ 46.

20 *Cincinnati Bell,* 69 F.3d at 760.

21 *Report and Order* at ¶ 51; *see also Cellular Reconsideration Order* at 79.

22 *See* S. Rep. No. 23, 104th Cong., 1st Sess. 22 (1995).

LECs do not pose the same competitive concerns as larger LECs. In the *Report and Order*, the Commission properly acknowledged Congress' "concern about burdens placed on small and rural LECs."[23] Unfortunately, while the Commission pays lip service to these congressional concerns, the rules it adopts in the *Report and Order* do little to allay them.

Moreover, these new rules undercut the Commission's efforts in its biennial review of regulations to "promote meaningful deregulation." ITTA participated in the Commission's December 17, 1997 Public Forum urging the Commission to eliminate many unnecessary regulatory burdens that are imposed on the Two Percent Companies. As a result, it is illogical for the Commission to add to the regulatory underbrush new burdens on Two Percent Companies where none are required to protect the public interest.

C. BURDENING MID-SIZED LECS WITH A SEPARATE AFFILIATE RULE WILL NOT PROMOTE COMPETITION IN CMRS SERVICES.

The Commission acknowledged in the *Report and Order* that existing non-structural safeguards adequately protect against many of the anticompetitive concerns that may arise out of a LEC's offering of in-region CMRS service.[24] In fact, the only justification that the Commission advanced for imposing a separate affiliate requirement on mid-sized LECs is its concern that a mid-sized LEC will use its "bottleneck facilities" to engage in discriminatory interconnection practices.[25] The Commission's unjustified concerns, however, regarding discriminatory interconnection cannot stand in the face of reality.

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23 *Report and Order* at ¶ 70.

24 *Id.* at ¶ 37.

25 *Id.* at ¶¶ 37, 53, 72.

By definition, mid-sized telephone companies provide telecommunications service over a relatively limited geographic area. Because the service area covered by CMRS provider typically is much greater than the local exchange area of a mid-sized LEC, the mid-sized LEC often is required to enter into interconnection agreements with LECs in adjoining markets. These interconnection agreements, along with any wireline interconnection agreements entered into between a mid-sized LEC and its competitors, must be publicly filed with the appropriate state regulatory authority. Because of this public filing requirement, it would not be feasible for the mid-sized LEC to engage in discriminatory interconnection practices with independent CMRS competitors. Moreover, it must be remembered that these CMRS competitors are often adjoining (and larger) LECs with greater resources and market power than the mid-sized LEC. It is inconceivable that the mid-size LEC would be able to discriminate against these larger LECs.

Nor does the Commission's decision to provide mid-sized LECs with an opportunity to obtain a suspension or modification of the separate affiliate requirement relieve the burden on mid-sized LECs. Mid-size telephone companies have provided CMRS service for over a dozen years without any indication that competitive CMRS providers have suffered from anticompetitive conduct. Mid-sized LECs should now not be required to "prove their innocence" before being allowed to offer in-region CMRS service without the use of a separate affiliate. Indeed, these new rules will only require mid-sized LECs to expend additional scarce resources and endure regulatory uncertainty as they wait for the Commission to act. Yet that is exactly what they would be required to do under the Commission's rules. If mid-sized LECs are to be burdened with a separate affiliate requirement, then that burden should be based on an actual

demonstration of competitive harm as required by *Cincinnati Bell*, not merely upon conjecture of what could happen in the worst-case scenario.

III. CONCLUSION

While properly recognizing that Two-Percent Companies should be regulated differently from larger LECs, the Commission failed to adopt rules that make any material distinction between the two with respect to the provision of in-region CMRS. Thus, the Commission's new rules fail to reflect the differences in market position between the Two Percent Companies and the largest LECs that the Commission itself has recognized. The Commission's separate affiliate rule, as applied to Two Percent Companies, reverses long-standing Commission policy and directly contravenes Congress's deregulatory policies as adopted in the 1996 Act. Accordingly, ITTA urges the Commission to reconsider its decision to institute a separate affiliate requirement with respect to Two Percent Companies.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sharon V. Snowden, hereby certify that, on this 2nd day of January, 1998, copies of the foregoing "Petition for Reconsideration" of the Independent Telephone & Telecommunications Alliance was served by hand delivery upon:

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